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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 177

MARY E. WENGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

CHARLES H. HATCH,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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No. 177

MARY E. WENGER,
Petitioner in this Court and also below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent in this Court and also below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States:

Your petitioner respectfully shows:

SECTION I.

Summary Statement of the Matter Involved.

By a letter dated November 18, 1937 set out in the petition filed with the Board of Tax Appeals (See Sec. II, R. 3; admitted in Commissioner's Answer Sec. II, R. 27; Exhibit A, R. 16) the Commissioner of Internal Revenue

notified the petitioner herein that the determination of her income tax liability for the taxable years ended December 31, 1934, and December 31, 1935, disclosed a deficiency of $6,780.89 (R. 16), for 1934, $2,350.04; for 1935, $4,430.85 (R. 17).

The reason assigned was that under a trust instrument set forth in the record (R. 37) as Exhibit A annexed to and a part of a stipulation of facts Section I (R. 30) executed by the petitioner Mary E. Wenger, as settlor, to A. W. Wenger as trustee, dated January 3, 1932 (R. 37), the trustee might distribute the entire income of the trust to Mrs. Wenger, and that therefore the trust instrument fell squarely within section 167 (a) (2) of the Revenue Act of 1934 (Act of May 10, 1934, C. 277, 48 Stat. 680 at pp. 729, 730) (R. 19, 20). The Commissioner further held that the fact that under the trust instrument the "distribution of the trust income could only be made at the discretion of the trustee" was no objection to this conclusion "for the trustee does not have an adverse interest" (R. 20).

For the complete text of Revenue Act of 1934, Sections 166 and 167, see R. 63.

On February 9, 1938, the petitioner herein filed her petition with the Board of Tax Appeals praying for a redetermination of the amount of her income taxes for the years 1934 and 1935 (R. 3).

The Commissioner of Internal Revenue answered the last mentioned petition (R. 26); and before the Board of Tax Appeals a stipulation of facts was filed (R. 29) and oral testimony given (R. 84). The Board of Tax Appeals rendered a finding of facts and opinion (R. 57; 42 B.T.A. 425) holding that the income of the trust for the years 1934 and 1935 was taxable to the petitioner under both Sections 166 and 167 of the Revenue Act of 1934 (R. 68).

The Board of Tax Appeals held that under Section 167 of The Revenue Act of 1934, one-half the income of the

trust for the years 1934 and 1935 was taxable to the petitioner herein because the trustee was without a substantial adverse interest (citing Reinecke v. Smith, 289 U. S. 172) and had the power to make such distribution (R. 65).

The Board of Tax Appeals also held that because under paragraphs G (1) and (2) of the trust instrument (R. 42) the trustee had power, in his discretion under certain circumstances, to distribute to the petitioner herein current income, accumulated income and corpus, and because the trustee was without a substantial adverse interest, all the income of the trust for the years 1934 and 1935 was taxable to the petitioner herein under both Sections 166 and 167 (R. 67).

The Board of Tax Appeals held certain losses deductible (R. 68, 69); a recomputation being made in consequence, the Board of Tax Appeals, on August 13, 1940, entered its decision that there was a deficiency in income for the year 1934 of $1,181.28, and for the year 1935 of $3,268.51 (R. 70).

On November 6, 1940, the petitioner herein filed her petition for a review by the United States Circuit Court of Appeals for the Sixth Circuit of the decision of the Board of Tax Appeals (R. 71).

The Circuit Court of Appeals for the Sixth Circuit heard the case, but filed no opinion. That court on April 7, 1942, made an order affirming the decision of the Board of Tax Appeals. The order, duly certified, is in the Record following page 91, and is reported as *Wenger* v. *Commissioner of Internal Revenue,* 127 F. 2nd 523. From the recitals in that order, it appears that the court found that the power to make distribution of the income or corpus of the trust to the petitioner herein was in the petitioner, and that the trustee had no substantial adverse interest in the disposition of the income or corpus of the trust property, and in that connection referred to Sections 166 and 167 of the Revenue Act of 1934 and the cases of *Reinecke* v. *Smith,*

289 U. S. 172, and *Altmaier* v. *Commissioner,* 116 F. 2d 162, 164 (C. C. A. 6).

It thus appears that the Commissioner of Internal Revenue, The Board of Tax Appeals, and the Circuit Court of Appeals all held that under the trust instrument of January 3, 1932 the trustee, in respect of the distribution of the income and corpus of the trust, was without adverse interest to the petitioner herein.

Error on this point was assigned in the Court of Appeals (R. 76, Assignment 7; R. 78, Assignments 16, 17; R. 79, Assignment 18; R. 81, Assignments 35, 38).

The principal question involved in said petition to the United States Circuit Court of Appeals for the Sixth Circuit was whether the trustee under said trust instrument was a person with a substantial interest in the distribution of the income and corpus of the trust adverse to the petitioner herein, and the decision of that question by the court materially affected the said affirmation of the decision of the Board of Tax Appeals.

The Trust Instrument.

The trust instrument dated January 3, 1934, executed by the petitioner herein, Mary E. Wenger, as grantor, to A. W. Wenger, trustee as grantee (R. 37), transferred securities of the market value of about $400,000.00 (R. 87) consisting in greater part of bonds (R. 38). All power of management is given to the trustee (R. 40, 41). The trust is to terminate in 15½ years from the date of the trust instrument unless sooner terminated by consent of the grantor and her four children and the trustee, or by the consent of the trustee and the grantor and the living children; or by the death of all the children prior to the expiration of the said period of 15½ years; or by the death of the grantor prior to the expiration of said 15½ years if all the children then living shall have attained 35 years

of age and shall have received conveyance to them by the trustees of their father's will of the property held by the latter trustees in which the children are interested as beneficiaries (R. 41).

Upon the termination of the trust, the accumulated income and corpus is to be distributed as provided in Section H of the trust instrument (R. 43).

The settlor was 69 years of age in September, 1939 (R. 30, Section III). The four children respectively became, or will become 35 years of age in November, 1935, September, 1940, August, 1942, March, 1947 (R. 30, 31, Section IV).

The motives of the settlor in creating the trust are set out in Sections B and C of the trust instrument (R. 38, 39, 40). Full powers of management are conferred on the trustee by Sections D and E, and no such powers are reserved to the settlor (R. 40, 41).

The powers and duties of the trustee respecting distribution of income and corpus are of two classes:

(1) Distribution to the settlor and her four children, which the trustee is permitted to make in his discretion;

(2) Distribution to the children which the trustee is required to make.

The terms of the trust instrument setting forth these powers of distribution are as follows:

> "G. Distribution from the income of the Trust Estate shall be made by the trustee and/or his successors as follows:
>
> "(1) In the event any accident, sickness, calamity, misfortune, adversity, bereavement or loss, financially or otherwise, shall visit, overtake or befall the maker hereof and/or any of her children, or their descendants, then and in that event the said Trustee may distribute to such beneficiary or beneficiaries hereof, upon her, his or their written request or requests, such sum

or sums which in the discretion of said Trustee, will be sufficient to alleviate, aid and relieve such beneficiary or beneficiaries from such misfortune or happening.

(2) In the event it should occur that any one or more of said children should suffer loss in the investment of funds received by them respectively from the Estate of Emil P. Wenger, deceased, at the time they respectively reached the ages of twenty-five and thirty years, after having followed advice given by the maker, regarding the investment of said funds, (as more particularly set forth in the early part of this Trust Agreement) then upon written request of any of such beneficiaries to the Trustee, he shall pay to any such beneficiary such sum or sums of money necessary to enable such beneficiary or beneficiaries to recoup such losses suffered by them respectively and thus place them in a situation where they will not run the risk of losing their right to demand and receive a conveyance to them respectively of the corpus of their respective Trust Estates, upon reaching thirty-five years of age.

It is not intended that the relief contemplated to be afforded by the above sections shall be limited merely to the accrued and accumulated income from the Trust Estate, but the Trustee is granted the right, power and authority of encroaching upon the principal of the Trust, should the income be insufficient at such time for the purposes set forth, and the gravity of the situation demands that the aid be furnished.

(3) In the event the earnings, income, rents, receipts and profits received by the Trustee, during any year, are sufficient in amount so that in the judgment of said Trustee it would be advisable to make a distribution of part or all of such surplus income, the Trustee shall be authorized to pay out and distribute all, or any part thereof, to the beneficiaries hereof in the following proportions; One-half of any

sum determined upon to be distributed, to the maker hereof, Mary E. Wenger; and the other half equally between my children, Alice E. M. Sandonnini, E. Boyer Wenger, P. Cedric Wenger and Louise Wenger, or the survivors. Provided, that if any of such children should die prior to the termination of this Trust, but leave a child or children surviving, then the share which would have been payable to the parent, if he or she were living at the time of such distribution, shall be payable to such issue per stirpes."

The will of Emil P. Wenger, deceased, (father of the children, as alleged in the petition to the Board of Tax Appeals, Section V, R. 6, and admitted in the Commissioner's Answer, Section V, R. 28) referred to in the trust instument in Section C (R. 39) and also in Section G (2) (R. 42) is Exhibit B (R. 48) attached to and a part of the stipulation of facts (R. 30, Section II).

Section II.

Questions Involved.

1. The principal question involved is whether the trustee, in making distribution of income and corpus of the trust, is a person having a substantial interest adverse to the petitioner, Mary E. Wenger.

2. The answer to that question depends upon the answer to the further question of what duty the trustee owed to the children who were beneficiaries of the trust, to so exercise his powers and the discretion given him by the trust instrument to conserve the income and corpus of the trust to the end that benefits to the children intended to be conferred by the trust may be enjoyed by them, and the liability of the trustee to account to the children in equity for a failure to perform that duty.

If such a duty rested on the trustee, and he was liable to account in equity to the children for a failure to perform it, he was interested adversely to Mrs. Wenger in the exercise of his discretion in determining what distribution to make to her.

Section III.

Reasons Relied On for the Allowance of the Writ.

1. The authority cited by the tribunals below for holding that the trustee was not adversely interested to the settlor is *Reinecke* v. *Smith*, 289 U. S. 172 (Commissioner's letter, R. 20; Board of Tax Appeals Opinion, R. 65; Order of the Circuit Court of Appeals, Record following p. 91). The citation of that case as authority in this connection is a misapplication thereof for it did not decide the questions here presented.

2. The United States Circuit Court of Appeals for the Sixth Circuit in this case has rendered a decision in conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit on the same matter in *Stuart* v. *Commissioner of Internal Revenue*, 124 F. 2d 772.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding said court to certify and send to this court a full and complete transcript of the Record and of the proceedings of said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket No. 8876, *Mary E. Wenger, Petitioner,* v. *Commissioner of Internal Revenue, Respondent,* to the end that this cause may be reviewed and determined by this court as provided by the statutes of

the United States; and that the judgment herein of the United States Circuit Court of Appeals for the Sixth Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated June 22, 1942.

MARY E. WENGER,
Petitioner;

By HENRY B. GRAVES,
Counsel for Petitioner,
CHARLES H. HATCH,
Of Counsel for Petitioner.